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7                   UNITED STATES DISTRICT COURT  
8                   WESTERN DISTRICT OF WASHINGTON  
9                   AT SEATTLE

10                   ELEANOR L. EVERETT,

11                   Plaintiff,

12                   v.

13                   BANKERS LIFE AND CASUALTY  
14                   CO.,

15                   Defendant.

16                   CASE NO. C13-2246JLR

17                   ORDER GRANTING SUMMARY  
18                   JUDGMENT

19                   I. INTRODUCTION

20                   This matter comes before the court on the Defendant Bankers Life and Casualty  
21                   Co. (“Bankers Life”) motion for summary judgment. (*See* Mot. (Dkt. # 1).) This is a  
22                   slip-and-fall case: Plaintiff Eleanor L. Everett alleges that she injured her back in an  
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23                   incident that occurred in Bankers Life’s supply room. Having considered the  
24                   submissions of the parties, the balance of the record, and the relevant law, and no party  
25                   has filed a response or otherwise challenged the motion, it is hereby ORDERED that

1 having requested oral argument,<sup>1</sup> the court GRANTS Bankers Life's motion for summary  
 2 judgment.

## 3 II. BACKGROUND

4 Ms. Everett alleges that, in August 2010, she injured her back in an accident at  
 5 work. The evidentiary record supporting this claim, however, is sparse.

6 Ms. Everett worked as an independent contractor for Bankers Life, selling  
 7 insurance. (Everett Decl. (Dkt # 19-2) Ex. C at 2; Everett Dep. (Dkt. # 18-6) at 56:2-11.)  
 8 In her deposition, Ms. Everett testified that on August 26, 2010, she entered the "resource  
 9 room" at Bankers Life's officer to look for forms. (Everett Dep. at 39:14-40:21.) She  
 10 testified that the room was lined with cupboards, equipment, and boxes so that there was  
 11 "just barely room to walk through." (*Id.*) She was, however, unable to describe or sketch  
 12 the layout of the room. (*See id.* at 47:22-52:1.) Pictures of the room as it exists today  
 13 show a lighted, door-less room located at the end of a hallway; one side of the room  
 14 contains a copy machine, the opposite side contains a counter with cabinets above and  
 15 below, and the back of the room contains bookshelves. (*See Dkt. ## 18-8 through 18-*  
 16 *12.*). Exhibit 1 shows two boxes on the floor against the back wall. (Dkt. # 18-8.) Ms.  
 17 Everett testified that at the time of her accident, the "whole area" in front of the cabinets  
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19       <sup>1</sup> Oral argument is not necessary where the non-moving party would suffer no prejudice.  
 20 *Houston v. Bryan*, 725 F.2d 516, 517-18 (9th Cir. 1984). "When a party has had an adequate opportunity  
 21 to provide the trial court with evidence and a memorandum of law, there is no prejudice in refusing to  
 22 grant oral argument." *Partridge v. Reich*, 141 F.3d 920, 926 (9th Cir. 1998) (quoting *Lake at Las Vegas*  
*Investors Grp., Inc. v. Pac. Malibu Dev. Corp.*, 933 F.2d 724, 729 (9th Cir. 1991) (internal punctuation  
 omitted)). "In other words, a district court can decide the issue without oral argument if the parties can  
 submit their papers to the court." *Id.* Here, the issues have been thoroughly briefed by the parties and  
 oral argument would not be of assistance to the court. Accordingly, the court will not hold oral argument.

1 shown in Exhibit 1 “was full of boxes.” (*See id.* at 53:14-54:7, 56:9-15, Ex. 1.<sup>2</sup>) She did  
2 not recall how many boxes there were; she did not recall how high the boxes were  
3 stacked; she “guessed” that the boxes were the same size as the two boxes in Exhibit 1;  
4 she “believed” that the boxes were filled with papers like the boxes in Exhibit 1; and she  
5 “suspected” that they were “ordinary brown cardboard boxes.” (*Id.* at 54:8-55:6.)

6 With respect to the accident, Ms. Everett testified repeatedly that she tripped over  
7 a box and fell:

8 Q: Okay. So, you’re in this resource room looking for forms. What  
happened?

9 A: I’m not absolutely positive. I tripped over something. I couldn’t tell  
you now what it was, but I believe it was a box.

10 Q: Okay. And what happened when you tripped?

11 A: I don’t understand.

12 Q: Well, did you fall to the ground? Did you catch yourself before you hit  
the ground?

13 A: I fell over—all I remember is falling, I think, over a box.

14 *Id.* at 40:22-41:7; *see also id.* at 42:5-10 (Q: . . . So, you tripped over what may have been  
15 a box; is that correct so far? A: Not entirely. Q: What have I misstated? A: You said  
16 “may have.” I think I did trip over a box. There was nothing else to trip over.”); *id.* at  
17 44:7-9 (“Q: Okay. So, to go over this again, you tripped over what may have been a box.

18 You’re sure you tripped? A: Yes.”). She did not, however, recall whether she tripped

19 \_\_\_\_\_  
20 <sup>2</sup> Bankers Life submits as evidence five photographs that were apparently exhibits to Ms.  
21 Everett’s deposition. (*See Dkt. ## 18-8 through 18-12.*) Although the exhibits used at the deposition were  
22 numbered 4 through 8, Bankers Life submits the photographs labeled as Exhibits 1 through 5 to Ms.  
Swanson’s declaration. (*See Dkt. ## 18-8 through 18-12; Everett Dep. at 52:2-24.*) By comparing the  
photographs with Ms. Everett’s descriptions in her deposition, it appears that when Ms. Everett  
referenced Exhibit 5 to describe the location of the boxes, she was referring to the photograph that is  
currently labeled Exhibit 1 to Ms. Swanson’s declaration (Dkt. # 18-8). (*See also* Swanson Decl. (Dkt.  
# 18-7) ¶ 13.)

1 over the boxes that she previously testified were lined in front of the cabinets, or over  
2 some other boxes. (*Id.* at 56:3-25.)

3 She does not recall why she tripped or what she was in the process of doing when  
4 she tripped. (*Id.* at 47:1-18; 55:16-19 (“Q: Can you tell me in your own words what  
5 caused you to trip, however you can explain it to me, if you recall. A: I don’t recall.”).)  
6 Her testimony was inconsistent as to whether she fell to the ground after she tripped.

7 (*Compare id.* at 41:8-15 (“Q: And then did you hit the ground? A: There was no ground.

8 Q: So, when you say you fell over this box, was the box in front of a cabinet or  
9 something? A: Right, exactly. Q: So, when you fell, did you catch yourself on the  
10 cabinet? A: No, I don’t know.”) *and id.* at 44:10-11 (Q: You did not fall to the ground?  
11 A: I never fell to the ground.”) *with id.* at 46:17-21 (“Q: So, tell me what happened when  
12 you tripped. A: I know that I fell. Q: You did fall? A. Well, I was on the floor, so I must  
13 have fallen.”). To the extent she maintained that she fell to the ground, she was unable  
14 to recall how the fall had happened:

15 Q: Okay. All right. And I’m still having trouble visualizing how you end  
16 up on the floor by tripping over boxes that are up against a cabinet.

A: Geez, it’s been a long time. I don’t recall.

17 (*Id.* at 57:1-4; *see also* at 57:20-58:2.)

18 The only admissible evidence that Ms. Everett has provided is her own declaration  
19 and two hospital intake records. With respect to the cause of the accident, Ms. Everett’s  
20 declaration states in full:

21 We had a resource room at Banker’ life [sic] that was very small and there  
22 were cupboards and boxes throughout the room along with copying  
equipment and you had to lean over these items in order to get supplies. As

1 I was reaching over the boxes to get some supplies some of the boxes fell  
 2 on me and knocked me to the floor. I do not recall if I was unconscious or  
 3 not, all I remember was being picked off the floor by people who heard me  
 4 fall. I started to have immediate pain in my back throughout down [sic] the  
 left side of my body. Other people at Banker's [sic] Life complained about  
 supplies out of the room.

5 (Everett Decl. Ex. A.)<sup>3</sup>

6 With respect to the intake records, the hospital that Ms. Everett visited three days  
 7 after the accident filled out a Report of Industrial Injury or Occupational Disease.

8 (Everett Decl. Ex. B at 1.) This report describes the occurrence of the injury as follows:  
 9 "In resource room, boxes were stacked around room, fell over boxes." *Id.* The Patient  
 10 Admit Fact Sheet, filled out by the hospital and Ms. Everett that same day, describes the  
 11 accident cause as "fell down moving boxes." (*Id.* at 2.) The Fact Sheet also states that  
 12 the incident occurred at "home." (*Id.* at 2, 3.).

13 Ms. Everett claims that, as a result of her accident, she has experienced continual  
 14 back pain, incurred medical bills in excess of \$100,000.00, and undergone back surgery  
 15 and physical therapy. (Interrog. Resp. (Dkt. # 18-3); Everett Dep. at 38:1-8.) But she has

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 18       <sup>3</sup> Ms. Swanson, Bankers Life's Office Administrator, testifies that the resource room has not  
 19 changed in lighting or arrangement since August 2010; that the lighting consists of fluorescent fixtures;  
 20 that unpacked boxes are placed at the back wall as shown in Exhibit 1; that empty boxes are immediately  
 21 discarded; that she does not recall any occasion where boxes were stacked in front of the cabinets; that  
 22 she does not recall any occasion where boxes were stacked high enough to fall on someone; and that no  
 one, including Ms. Everett, has complained to her that the room was "unsafe." (See Swanson Decl. ¶¶ 6-  
 15.) For the purposes of summary judgment, however, the court must view all of the evidence in the light  
 most favorable to Ms. Everett, and must not make credibility determinations. *See Reeves v. Sanderson  
 Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). According, the court credits Ms. Everett's testimony  
 above.

1 not set forth any affirmative evidence regarding a medical diagnosis or treatment, or  
2 otherwise substantiating her damages claim. (*See generally* Dkt.)

3       Nonetheless, Ms. Everett brings a claim for negligence against Bankers Life. (*See*  
4       Compl. (Dkt. # 1-1).) Bankers Life has moved for summary judgment. (*See Mot.*) That  
5       motion is now before the court.

### III. ANALYSIS

#### A. Summary Judgment Standard

8           Federal Rule of Civil Procedure 56 permits a court to grant summary judgment  
9 where the moving party demonstrates (1) the absence of a genuine issue of material fact  
10 and (2) entitlement to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S.  
11 317, 322 (1986); *see also Galen v. Cnty. of L.A.*, 477 F.3d 652, 658 (9th Cir. 2007). The  
12 moving party bears the initial burden of showing the absence of a genuine issue of  
13 material fact. *Celotex*, 477 U.S. at 323. If the moving party does not bear the ultimate  
14 burden of persuasion at trial, it can show the absence of an issue of material fact in two  
15 ways: (1) by producing evidence negating an essential element of the nonmoving party's  
16 case, or, (2) by showing that the nonmoving party lacks evidence of an essential element  
17 of its claim or defense. *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1106  
18 (9th Cir. 2000).

If the moving party meets its burden of production, the burden then shifts to the nonmoving party to identify specific facts from which a factfinder could reasonably find in the nonmoving party's favor. *Celotex*, 477 U.S. at 324; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). In determining whether the factfinder could reasonably

1 find in the nonmoving party's favor, "the court must draw all reasonable inferences in  
2 favor of the nonmoving party, and it may not make credibility determinations or weigh  
3 the evidence." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000).  
4 However, a jury "is permitted to draw only those inferences of which the evidence is  
5 reasonably susceptible; it may not resort to speculation." *British Airways Bd. v. Boeing*  
6 *Co.*, 585 F.2d 946, 952 (9th Cir. 1978). Moreover, a "non-movant's bald assertions or a  
7 mere scintilla of evidence in his favor are both insufficient to withstand summary  
8 judgment." *F.T.C. v. Stefanchik*, 559 F.3d 924, 929 (9th Cir. 2009). If the nonmoving  
9 party fails to produce enough evidence to create a genuine issue of material fact,  
10 summary judgment for the moving party is proper. *Nissan Fire*, 210 F.3d at 1106.

11 **B. Motion to Strike and for Sanctions**

12 As a preliminary matter, the court addresses Bankers Life's motion to strike and  
13 for sanctions. (Mot. to Strike (Dkt. # 21).) Ms. Everett originally filed two additional  
14 declarations from third parties in support of her opposition to the motion for summary  
15 judgment. (See Dkt. ## 19-1, 19-3.) Bankers Life moves to strike these declarations  
16 pursuant to Federal Rule of Civil Procedure 37(c) because Ms. Everett did not identify  
17 the witnesses in her initial disclosures. (See Mot. to Strike at 1-4; Simmons Decl. (Dkt.  
18 # 21-1) ¶ 6.) Ms. Everett has now withdrawn these declarations. (Everett Resp. to Mot.  
19 to Strike (Dkt. # 23).) As such, Bankers Life's motion to strike is moot.

20 Bankers Life also moves for case-dispositive sanctions, claiming that the  
21 declaration filed under Chuck Taylor's name on December 15, 2014, is fraudulent. (Mot.  
22 to Strike at 5-6; *see also* (False Taylor Decl. (Dkt. # 19-1).) A district court "has the

1 inherent authority to impose sanctions for bad faith, which includes a broad range of  
2 willful improper conduct.” *Fink v. Gomez*, 239 F.3d 989, 992 (9th Cir. 2001); *see also*  
3 *B.K.B. v. Maui Police Dep’t*, 276 F.3d 1091, 1107-08 (9th Cir. 2002), *as amended* (Feb.  
4 20, 2002); *Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 767 (1980). Upon a finding of bad  
5 faith, courts can levy an assortment of sanctions under their inherent power, including  
6 monetary awards, attorneys’ fees, adverse inference jury instructions, and even dismissal  
7 of claims. *Apple, Inc. v. Samsung Elecs. Co., Ltd.*, 881 F. Supp. 2d 1132, 1135 (N.D.  
8 Cal. 2012) (collecting cases); *see also Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991).  
9 Sanctions should be commensurate to the sanctioned party’s degree of fault and the other  
10 party’s prejudice. *See Zest IP Holdings, LLC v. Implant Direct Mfg., LLC*, No. CIV. 10-  
11 0541-GPC WVG, 2013 WL 6159177, at \*7 (S.D. Cal. Nov. 25, 2013). “A trial court’s  
12 inherent powers unquestionably include the power to assess attorney’s fees against any  
13 counsel who willfully abuses judicial process or otherwise conducts litigation in bad  
14 faith.” *Barnd v. City of Tacoma*, 664 F.2d 1339, 1342 (9th Cir. 1982).

15 The false declaration is electronically signed “/s/ Chuck Taylor” and purports to be  
16 signed “under penalty of perjury of the laws of the State of Washington.” (False Taylor  
17 Decl. at 2.) Mr. Taylor, however, has provided an authentic declaration stating that he  
18 “did not authorize the Declaration that was filed in this case under my name on  
19 December 15, 2014 as Document 19-1.” (Taylor Decl. (Dkt. # 22-1) ¶ 3.) He testifies  
20 that he “did not see the Declaration at any time until counsel for Bakers Life sent it to  
21 [him] as an e-mail attachment.” (*Id.* ¶ 4.) He also states that when Ms. Everett  
22 telephoned and asked him to be a witness for this case, he told her that he “did **not** want

1 to sign anything for this lawsuit.” (*Id.* ¶ 8 (emphasis in original).) Nonetheless, on  
2 December 15, 2014, Ms. Everett left him a voice message “advising that she was going to  
3 file something anyway.” (*Id.* ¶ 9.) Mr. Taylor’s authentic declaration is signed with his  
4 handwritten, cursive signature. (*Id.* at 3.)

5 For her part, Ms. Everett contends that Mr. Taylor gave her a handwritten  
6 statement, which she faxed to her attorney to be typed up and filed. (2d Everett Decl.  
7 (Dkt. 24); Stmt. (Dkt. # 24-1); *see generally* Resp. to Mot. to Strike (Dkt. # 23).) Ms.  
8 Everett claims that she was justified in filing the declaration in Mr. Taylor’s name  
9 because he did not tell her that he did not want the statement to be used, so she “simply  
10 used the statements . . . provided to [her].” (*Id.*) The court notes that the signature on the  
11 handwritten statement supposedly provided by Mr. Taylor is in print, rather than cursive,  
12 and does not match the signature on Mr. Taylor’s authentic declaration. (*Compare* Stmt.  
13 *with* Taylor Decl.) The docket shows that Ms. Everett’s attorney typed up the statement,  
14 electronically signed Mr. Taylor’s name, and filed the statement at docket number 19-1.  
15 (*See also* Resp. to Mot. to Strike.) The attorney, however, procured neither permission  
16 from Mr. Taylor to sign Mr. Taylor’s name nor confirmation from Mr. Taylor that the  
17 information in the declaration was true and correct. (*See id.*; Taylor Decl. ¶¶ 3-4.) In  
18 fact, Mr. Taylor testifies that some of the information is incorrect. (*See* Taylor Decl. ¶ 7.)

19 Even accepting Ms. Everett’s version of events as true, the purported declaration is  
20 fraudulent: it purports to be signed by Mr. Taylor under penalty of perjury when Mr.  
21 Taylor did not, in fact, sign the declaration, and does not, in fact, “declare or affirm that  
22 the [contents of the declaration are] true and correct.” (*See* False Taylor Decl.) Signing

1 someone else's name to a court filing without their permission is willful, deceitful  
2 conduct. So, too, is attempting to mislead the court by falsely representing that a witness  
3 has attested to certain facts under oath. Therefore, the court finds that Ms. Everett's  
4 counsel's actions constitute bad faith or conduct tantamount to bad faith. *See Barnd*, 664  
5 F.2d at 1342; *Fink*, 239 F.3d at 992. Although the prejudice to Bankers Life is largely  
6 alleviated now that the declaration has been withdrawn, the court finds that Bankers Life  
7 is at least entitled to the attorneys' fees associated with its motion to strike the fraudulent  
8 declaration. *See Barnd*, 664 F.2d at 1342. Bankers Life shall file a separate motion  
9 detailing its requested fees for the court's consideration.

10 **C. Sham Affidavit**

11 The court turns next to the subject of Ms. Everett's declaration. "The general rule  
12 in the Ninth Circuit is that a party cannot create an issue of fact by an affidavit  
13 contradicting his prior deposition testimony." *Van Asdale v. Int'l Game Tech.*, 577 F.3d  
14 989, 998 (9th Cir. 2009). "This sham affidavit rule prevents a party who has been  
15 examined at length on deposition from raising an issue of fact simply by submitting an  
16 affidavit contradicting his own prior testimony, which would greatly diminish the utility  
17 of summary judgment as a procedure for screening out sham issues of fact." *Yeager v.*  
18 *Bowlin*, 693 F.3d 1076, 1080 (9th Cir. 2012) (internal punctuation omitted) (quoting  
19 *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir. 1991)). The sham affidavit  
20 rule, however, "should be applied with caution." *Van Asdale*, 577 F.3d at 998. To apply  
21 the rule, the court must first "make a factual determination that the contradiction was  
22 actually a 'sham.'" *Id.* Second, "the inconsistency between a party's deposition

1 testimony and subsequent affidavit must be clear and unambiguous to justify striking the  
2 affidavit.” *Id.* at 998-999. Therefore, the “non-moving party is not precluded from  
3 elaborating upon, explaining or clarifying prior testimony elicited by opposing counsel on  
4 deposition and minor inconsistencies that result from an honest discrepancy, a mistake, or  
5 newly discovered evidence afford no basis for excluding an opposition affidavit.” *Id.*  
6 (internal punctuation omitted) (quoting *Messick v. Horizon Indus.*, 62 F.3d 1227, 1231  
7 (9th Cir. 1995)).

8 The court finds that the portion of Ms. Everett’s declaration describing her  
9 accident is a sham. (*See* Everett Decl. Ex. A.) Regarding the accident, Ms. Everett’s  
10 declaration states in full: “As I was reaching over the boxes to get some supplies some of  
11 the boxes fell on me and knocked me to the floor.” (*See id.*) This statement is not a  
12 minor inconsistency or clarifying testimony. Rather, Ms. Everett’s assertion that she was  
13 knocked over by falling boxes contradicts her previous deposition testimony that she fell  
14 because she tripped over a box on the floor. (*See* Everett Dep. at 44:7-9 (“Q: Okay. So,  
15 to go over this again, you tripped over what may have been a box. You’re sure you  
16 tripped? A: Yes.”).) The distinction between the two is clear and unambiguous. *Van*  
17 *Asdale*, 577 F.3d at 998. Ms. Everett, however, offers no explanation as to why she has  
18 changed her story. (*See* Resp.; Everett Decl.) There is no suggestion that Ms. Everett’s  
19 new testimony is based on newly discovered evidence or that her prior deposition  
20 testimony was an “honest discrepancy” or mistake. *See Van Asdale*, 577 F.3d at 998.  
21 This conclusion is especially apt given that Ms. Everett repeatedly insisted during her  
22 deposition that she had tripped over a box on the floor, and never once mentioned boxes

1 falling onto her and knocking her to the floor. (*See* Everett Dep. 40:22-41:7; 42:5-10;  
2 44:7-9.) Additionally, the hospital intake records describe the cause of accident to be  
3 tripping over a box. (*See* Everett Decl. Ex. B at 1-3.) But no evidence in the record  
4 supports Ms. Everett's new version of the story. Therefore, the court strikes the portion  
5 of Ms. Everett's declaration regarding the cause of her accident as a sham, and will not  
6 consider it in rendering its decision on Banker Life's motion for summary judgment. *See*  
7 *Yeager v. Bowlin*, 693 F.3d 1076, 1080 (9th Cir. 2012) (affirming finding that a  
8 declaration was a sham because "the deponent remember[ed] almost nothing about the  
9 events central to the case during his deposition, but suddenly recall[ed] those same events  
10 with perfect clarity in his declaration in opposition to summary judgment without any  
11 credible explanation as to how his recollection was refreshed"); *see also Ah Quin v. Cnty.*  
12 *of Kauai Dep't of Transp.*, 733 F.3d 267, 289 (9th Cir. 2013) ("[Plaintiff] cannot create a  
13 genuine issue of material fact and thus avoid summary judgment simply by swearing to  
14 facts that are contradicted by the record.").

15 **D. Washington Premises Liability**

16 Finally, the court reaches the merits of the motion. A cause of action for  
17 negligence requires the plaintiff to establish "(1) the existence of a duty owed, (2) breach  
18 of that duty, (3) a resulting injury, and (4) a proximate cause between the breach and the  
19 injury." *Pedroza v. Bryant*, 677 P.2d 166, 168 (Wash. 1984). According to premises  
20 liability theory, a landowner owes an individual a duty of care based on the individual's  
21 status (invitee, licensee, or trespasser) upon the land. *Curtis v. Lein*, 239 P.3d 1078, 1081  
22 (Wash. 2010). Employees of independent contractors hired by landowners are invitees

1 on the landowners' premises. *Kamla v. Space Needle Corp.*, 52 P.3d 472, 477 (Wash.  
2 2002).

3 Washington has adopted sections 343 and 343A of the *Restatement (Second) of*  
4 *Torts* to define a landowner's duty to invitees. *Kamla*, 52 P.3d at 477. The Restatement  
5 provides that a possessor of land is subject to liability for physical harm caused to his  
6 invitees by a condition on the land only if the possessor "(a) knows or by the exercise of  
7 reasonable care would discover the condition, and should realize that it involves an  
8 unreasonable risk of harm to such invitees, and (b) should expect that they will not  
9 discover or realize the danger, or will fail to protect themselves against it, and (c) fails to  
10 exercise reasonable care to protect them against the danger." *Id.* (quoting *Restatement*  
11 (*Second*) of *Torts* § 343). Additionally, "a possessor of land is not liable to his or her  
12 invitees for physical harm caused to them by any activity or condition on the land whose  
13 danger is known or obvious to them, unless the possessor should anticipate the harm  
14 despite such knowledge or obviousness." *Id.* (quoting *Restatement (Second) of Torts* §  
15 343A (emphasis and brackets omitted)).

16 **E. Ms. Everett's Claim**

17 Ms. Everett's claim for negligence fails because, on the record before the court, a  
18 reasonable fact-finder could not find that the state of Bankers Life's resource room  
19 involved an "unreasonable risk of harm." *See id.* Viewed in the light most favorable to  
20 Ms. Everett, the available evidence shows only that the room was crowded with furniture  
21 and equipment, and an unknown number of boxes occupied the floor space in front of the  
22 cabinets. (*See* Everett Decl. Ex. A; Everett Dep. 39:14-40:21; 53:14-54:7, 56:9-15; Dkt.

1 # 18-8.) This, without more, is insufficient to show an unreasonable risk of harm. In  
2 *Charlton v. Toys R Us*, the Washington Court of Appeals affirmed a summary judgment  
3 finding of no negligence because although the plaintiff had shown that the entryway floor  
4 was wet, she “failed to present any evidence that the floor in the entryway of the Toys R  
5 Us store presented an unreasonable risk of harm when wet.” *Charlton v. Toys R Us—*  
6 *Delaware, Inc.*, 246 P.3d 199, 203 (2010) (“For that reason alone, summary judgment  
7 was proper.”) The court found that the trial court properly “rejected [the plaintiff’s]  
8 position that that a wet floor is *always* a dangerous condition, and that she was therefore  
9 excused from presenting evidence of an unreasonable risk created by this particular wet  
10 floor.” *Id.*

11       Similarly, here, it is possible that, in certain configurations, a room crowded with  
12 boxes could present a dangerous condition with an unreasonable risk of harm. But it is  
13 pure speculation as to whether such configuration existed in Bankers Life’s supply room.  
14 *See British Airways Bd.*, 585 F.2d at 952. Ms. Everett has put forth no evidence of the  
15 unreasonable risk created by these particular boxes. In fact, she does not even remember  
16 how high the boxes were stacked, whether the room was lighted, or how she tripped.  
17 (Everett Dep. 42:11-43:3, 47:1-18, 54:8-55:6, 55:16-19, 56:3-25, 57:1-4 “(Q. . . . And  
18 I’m still having trouble visualizing how you end up on the floor by tripping over boxes  
19 that are up against a cabinet. A. Geez, it’s been a long time. I don’t recall.”); *see also*  
20 *Little v. Countrywood Homes, Inc.*, 133 P.3d 944, 947 (Wash. Ct. App. 2006) (finding no  
21 probable cause because the plaintiff did not remember how his jobsite accident occurred).  
22

1 The position that boxes in crowded rooms are *always* a dangerous condition, however, is  
 2 impermissible. *See Charlton*, 246 P.3d at 203.

3 Ms. Everett's declaration stating that "other people at Banker's [sic] Life  
 4 complained about the resource room because it was unsafe" does not rescue her claim.  
 5 (See Everett Decl. Ex. A.) "When the nonmoving party relies only on its own affidavits  
 6 to oppose summary judgment, it cannot rely on conclusory allegations unsupported by  
 7 factual data to create an issue of material fact." *Hansen v. United States*, 7 F.3d 137, 138  
 8 (9th Cir. 1993); *see also F.T.C. v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th  
 9 Cir. 1997), *as amended* (Apr. 11, 1997) ("A conclusory, self-serving affidavit, lacking  
 10 detailed facts and any supporting evidence, is insufficient to create a genuine issue of  
 11 material fact."). Ms. Everett presents no evidence, other than her bald assertion, that the  
 12 room was "unsafe." But "a non-movant's bald assertions or a mere scintilla of evidence  
 13 in his favor are both insufficient to withstand summary judgment."<sup>4</sup> *Stefanchik*, 559 F.3d  
 14 at 929. Because Ms. Everett raises no more than a scintilla of evidence supporting the  
 15 essential element of "unreasonable risk," summary judgment is appropriate. *See Nissan*  
 16 *Fire*, 210 F.3d at 1106.

#### 17 IV. CONCLUSION

18 For the foregoing reasons, the court GRANTS Bankers Life's motion for summary  
 19 judgment (Dkt # 18). The court GRANTS in part and DENIES in part Bankers Life's

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20       <sup>4</sup> In addition, Ms. Everett's statement that other people had complained that the supply room was  
 21 unsafe is hearsay. *See Fed. R. Evid. 801*. This statement would be inadmissible at trial to prove the truth  
 22 of the matter asserted. *See Fed. R. Evid. 802*. As such, it is not an appropriate basis for opposing a  
 summary judgment motion. *See Fed. R. Civ. P. 56(c)(2)*. For this reason also, summary judgment is  
 appropriate.

1 motion to strike and for sanctions (Dkt. # 21). Bankers Life may bring a separate motion  
2 for attorneys' fees as described above.

3 Dated this 9th day of January, 2015.

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7 JAMES L. ROBART  
8 United States District Judge  
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